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July 2, 2004

**VIA ELECTRONIC MAIL AND FIRST-CLASS MAIL SERVICE**
The Honorable Bruce Duke
Executive Director
**South Carolina Public Service Commission**
101 Executive Center Dr., Suite 100
Columbia, SC 29210

RE: **Docket No. 2003-326-C**, In Re: Analysis of Continued Availability of Unbundled Local Switching for Mass Market Customers Pursuant to the Federal Communications Commission's Triennial Review Order

**Docket No. 2003-327-C,** Continued Availability of High Capacity Loops at Certain Locations and Unbundled High Capacity Transport on Certain Routes Pursuant to the Federal Communication Commission's Triennial Review Order

**Our File No. 611-10158**

Dear Mr. Duke:

Attached please find **AT&T's Response to Verizon's Opposition to Emergency Petition, and Petition for Declaratory Order** for filing on behalf of AT&T Communications of the Southern States, LLC ("AT&T") in the above-referenced Dockets.

Should you have any questions, please contact me.

With kind regards, I am

Yours truly,

John J. Pringle, Jr.

JJP/cr
Attachments
Cc: All Parties of Record

**BEFORE THE**
**PUBLIC SERVICE COMMISSION OF**
**SOUTH CAROLINA**

In Re:

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| Analysis of Continued Availability of Unbundled Local Switching for Mass Market Customers Pursuant to the Federal Communications Commission's Triennial Review Order | ) | **Docket No. 2003-326-C** |

In Re:

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| Continued Availability of Unbundled High Capacity Loops at Certain Locations and Unbundled High Capacity Transport on Certain Routes Pursuant to the Federal Communications Commission's Triennial Review Order | ) | **Docket No. 2003-327-C** |

**AT&T'S RESPONSE TO VERIZON'S OPPOSITION TO EMERGENCY PETITION, AND PETITION FOR DECLARATORY ORDER**

AT&T Communications of the Southern States, L.L.C. ("AT&T") files this response to Verizon South Inc.'s ("Verizon") Response in Opposition to the Emergency Petition of CompSouth.[1] It is unclear whether Verizon's opposition is a request that the Petition be dismissed or a substantive response to the Petition. Regardless, for the reasons stated herein, AT&T requests that the Public Service Commission of South Carolina ("Commission") issue a Declaratory Order (pursuant to Commission Rule 103-836(A)(2)) that Verizon's obligations under the Verizon/AT&T Interconnection Agreement filed with this Commission (the "ICA")

[1] Although AT&T files this response alone, the original petition in this docket was filed by CompSouth. CompSouth is the Competitive Carriers of the South, Inc. The members of CompSouth include: Access Integrated Networks, Inc., Access Point Inc., AT&T, Birch Telecom, Covad Communications Company, IDS Telecom LLC, ITC^DeltaCom, KMC Telecom, LecStar Telecom, Inc., MCI, Momentum Business Solutions, Network Telephone Corp., NewSouth Communications Corp., NuVox Communications Inc., Talk America Inc., Xspedius Communications, and Z-Tel Communications. DSLnet Communications LLC also joined the petition.

remain in effect unless and until the ICA is amended, filed with and approved by the Commission. AT&T requests that the Commission consider this matter expeditiously and issue this order under its authority to enforce the terms of the ICA and the requirements under the Telecommunications Act of 1996 ("the Act") and South Carolina law.

## I. INTRODUCTION

Verizon cannot unilaterally abrogate its obligations to provide unbundled network elements ("UNEs") at Total Element Long Run Incremental Cost ("TELRIC") on the pretext that *United States Telecom Assoc. v. FCC*[2] permits it to do so. Verizon remains obligated under the ICA to continue making existing UNEs available at TELRIC prices. This Commission has the authority under both federal and state law to ensure that Verizon complies with those obligations. Emergency relief is necessary because Verizon has announced that it will discontinue provisioning UNEs in violation of the ICA, the Act, and state law. Verizon's actions will disrupt the market and harm competition.

The D.C. Circuit's decision in *USTA II* does not allow Verizon to discontinue provisioning UNEs, but even if it did Verizon could not *unilaterally* terminate these services. Under the change-of-law provisions in the ICA, Verizon would be required to negotiate with AT&T and, failing an agreement, the parties would proceed to the dispute resolution provisions in the ICA.

Faced with these same issues, state commissions have imposed "stand-still" orders in Rhode Island, Connecticut, Washington, West Virginia, New Jersey, the District of Columbia, Michigan and Indiana.[3] These orders illustrate AT&T's need for relief:

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[2] 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

[3] While a New York ALJ decided to not issue an order at this time to maintain the *status quo*, the ALJ's decision was based purely on procedural grounds. The ALJ invited CLECs to challenge Verizon's interpretation of its ICA

*(footnote continued on next page)*

- The West Virginia Commission ruled that Verizon-WV must maintain existing UNEs until further order: "[T]he Commission will require Verizon-WV to continue to provide UNEs, including but not limited to: dedicated interoffice transport (including dark fiber interoffice transport), high-capacity loops, and mass market switching - at the rates, terms and conditions presently contained in its existing interconnection agreements in West Virginia, unless or until the Commission authorizes Verizon-WV to cease providing specific UNEs. **Provision of UNEs is required because this Commission has not determined that local competition can continue to exist or to grow in their absence.**" *VERIZON WEST VIRGINIA, INC. Petition for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in West Virginia pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order*, Case No. 04-0359-T-PC, Commission Order (June 8, 2004) (emphasis supplied).

- The Michigan Public Service Commission ordered that SBC and Verizon "shall honor their commitment to continue the status quo with respect to providing unbundled network elements and the unbundled network element platform to competitive local exchange companies with which either has approved interconnection agreements, until the parties have appropriately amended their interconnection agreements or the Commission orders otherwise." *In the matter of a request for declaratory ruling, or in the alternative, complaint of Comptel/Ascent Alliance et al. against Michigan Bell Telephone Company, d/b/a SBC Michigan, and Verizon North Inc. and Contel of the South Inc., d/b/a Verizon North Systems*, Case No. U-14139, Opinion and Order (June 3, 2004) at 6.

- The District of Columbia Public Service Commission ordered that "Verizon Washington DC, Inc. shall continue to provide unbundled network elements in its current interconnection agreements at the same rates, terms, and conditions until amendments to the interconnection agreements have been negotiated or arbitrated; or the Commission determines otherwise." *In the matter of The Effect of the USTA II Decision on the Local Telecommunications Marketplace in the District of Columbia*, Formal Case No. 1029, Order No. 13222 (June 15, 2004) at 14.

- The Indiana Utility Regulatory Commission issued a stand-still order, stating as follows: "There will continue to be issues to be sorted out, both at the state and federal levels, with respect to the purposes of the federal Telecommunications Act of 1996 and efforts, like the TRO, to further implement those purposes. **However, until the relevant issues can be sorted out, maintaining stability in the marketplace is essential.** To that end, we find that the ILEC parties to these Causes: SBC Indiana, Sprint and Verizon should, until

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*(footnote continued from previous page)*

requirements once Verizon has taken the step of notifying its intention to cease providing UNEs at current rates. State of New York Public Service Commission, *Petition of Verizon New York Inc. for Consolidated Arbitration to Implement Changes in Unbundled Network Element Provisions in Light of the Triennial Review Order*, Case 04-C-0314; *Petition of AT&T Communications of New York, Inc. for Arbitration of Interconnection Agreement Amendments*, Case 04-C-0318, Ruling Granting Motions for Consolidation and to Hold Proceeding in Abeyance (June 9, 2004) at 7-8.

at least the end of this year, continue to honor their existing interconnection agreements, including any applicable amendments approved by the Commission, and should continue to provide unbundled access to network elements at prices approved by the Commission. *In the matter of the Indiana Utility Regulatory Commission's Investigation of Matters Related to the Federal Communications Commission's Report and Order and Order on Remand and Further Notice of Proposed Rulemaking in CC Docket Nos. 01-338, 96-98, and 98-147*, Cause Nos. 42500, 42500-S1 and 42500-S2 (June 14, 2004)(emphasis supplied).

These issues are of vital importance to the thousands of South Carolina consumers currently receiving telephone service from competitive carriers using UNE-P arrangements. The re-pricing of UNEs at resale, special access or other rates will disrupt the market by increasing the CLECs's financial and administrative costs for providing local exchange. Depending upon each CLEC's business plan, this may result in CLECs raising retail rates or withdrawing from the market altogether. Inevitably, Verizon's share of the local exchange market will increase, not because of inherent efficiencies and increased value to customers, but rather through defiance of regulatory and public policies carefully designed to provide a level competitive playing field. Such an outcome would significantly harm South Carolina consumers.

Therefore, the Commission should take any and all appropriate measures to preserve the status quo with respect to the terms, conditions, and rates under which Verizon currently provides UNEs. The Commission should further prohibit Verizon from making any change to those terms, conditions, and rates without the express prior approval of the Commission, granted after all interested parties have had appropriate notice and the opportunity to be heard.

## II. ARGUMENT

### A. Emergency Declaratory Relief is Necessary Because Verizon Will Stop Providing Services in Violation of the ICAs, the Act, and State Law

The Commission should issue an emergency declaratory ruling because without such relief Verizon will stop providing UNEs and other services at rates necessary to maintain competition. Verizon has stated that it *will* provide 90 days of notice and *will* discontinue access

to UNEs at existing rates. (Opposition at 5.) Verizon argues that its ICAs "expressly permit Verizon, either immediately or after a specified time period, to discontinue UNEs." (Opposition at 2.) Thus, Verizon plans to provide 90 days notice, after which it will only make UNEs available either at resale or special access rates, which would significantly harm a CLECs ability to compete with Verizon, or under "commercially negotiated arrangements," which are in reality contracts of adhesion.[4] If a CLEC such as AT&T refuses to comply with one of these options Verizon will stop providing the CLEC these services. (Opposition at 5.)

Verizon's interpretation of the ICA is wrong. Allowing Verizon to maintain this position—that the ICA allows it unilaterally to terminate access to UNEs—poses a significant threat to the stability of the market. If the Commission does not act, Verizon will repudiate its obligations under the ICA and the Act. This will disrupt the market and harm competition. Therefore, the Commission should issue a declaratory ruling to make clear Verizon's obligations to continue provisioning UNEs unless and until an appropriate proceeding amends the existing ICA.

### B. The *USTA II* Decision Did Not Change Verizon's Unbundling Obligations, and the Commission Has the Authority to Continue to Impose These Obligations

Contrary to Verizon's suggestion, the *USTA II* decision does not obviate Verizon's provisioning obligations under the ICA. Verizon's argument assumes the TRO alone imposed the unbundling obligation. It did not. Verizon's unbundling obligations stem directly from the Act itself, as well as relevant State law. The obligations are also implemented in a Commission-approved ICA. The *USTA II* decision, therefore, did not "vacate" these obligations, and the Commission does not need to "re-impose" any obligations. And because there has been no

[4] As discussed *infra* at 10-11, Verizon will have far superior bargaining position in such negotiations.

change-of-law, there is no need to refer to the provisions in the ICA designed to handle such a situation.

### 1. The *USTA II* Decision Did Not Alter Verizon's Unbundling Obligations

Neither this Commission, the FCC, nor the D.C. Circuit has made any determination that Verizon is *required* to discontinue any UNE or combination of UNEs. The *USTA II* court did not overturn the Act or make any non-impairment findings or determine that any UNEs could be withdrawn. Rather, the decision simply vacated and remanded the TRO rules to the FCC for further deliberation consistent with the court's rulings. The FCC is currently attempting to comply with this order. Until the FCC implements new rules, this Commission is obligated, under the pro-competition directives of the Act and State law, to maintain the status quo.

### 2. The Commission is Not Preempted from Imposing Unbundling Obligations

The Commission is not preempted by Federal law from filling the void left by vacatur of the FCC's unbundling rules. Nothing in the 1996 Act limits state-law unbundling authority; to the contrary, this authority is explicitly safeguarded through multiple express savings clause. In enacting the statute, Congress noted with approval ongoing state efforts to "open the local networks of telephone companies,"[5] and endeavored to build on them – not kill them. As the FCC stated in one of its first orders construing the statute, the Act did not "intend . . . to disrupt the pro-competitive actions some states already ha[d] taken" or that other states would take.[6]

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[5] S. Rep. No. 104-23 at 5 (1995).

[6] *First Report and Order, Implementation of the Local Competition Provisions in Telecomms. Act of 1996*, 11 FCC Rcd. 15,499, 62 (1996).

This intent is clearly evinced by the structure of the Act and by the explicit savings clauses that safeguard state authority.[7] The Act provides that "notwithstanding" the limited federal standards in § 252(e)(2) for rejecting negotiated and arbitrated interconnection agreements, "nothing in this [§ 252] shall prohibit a State commission from establishing or enforcing other requirements of *State* law in its review of an agreement."[8] Congress preserved this authority with only one qualification: the state commission may enforce or establish state law requirements "subject to § 253 of this title," which prohibits states from imposing legal requirements that create barriers to competitive entry. Thus, so long as it does not invoke state law to create barriers to entry in violation of § 253 of the Act, a state may exercise its inherent sovereign power to regulate intrastate facilities and services (including the terms of competitive access to local telephone networks).

In addition, while § 252 expressly preserve the Commission's ability to impose state-law requirements (other than those that erect barriers to entry) when reviewing ICAs, § 251 of the Act bars the FCC from doing anything to block such pro-competitive measures. That section, when read in conjunction with §§ 252 and 253, sets up the FCC's regulations as no more than minimum national floors. In particular, while § 251(d)(1) requires the FCC to adopt regulations to implement the unbundling and other requirements of § 251, § 251(d)(3) limits the FCC's ability to preempt state law when doing so. Specifically, § 251(d)(3), entitled "Preservation of State access regulations" bars the FCC from "prescribing" or "enforcing" regulations under § 251 that "preclude the enforcement of any regulation, order, or policy of a State," so long as those state measures are "consistent with the requirements of this [§ 251]," and do "not

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[7] *See* 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(c), Act, Pub. L. No. 104-104 § 601(c)(1), 110 Stat. 56, 143 (uncodified note to 47 U.S.C. § 152).

[8] 47 U.S.C. § 252(e)(3) (emphasis added).

substantially prevent implementation of the requirements of this section and the purposes of this part [of the Act]."[9] Significantly, § 251(d)(3) measures the lawfulness of state regulation by its consistency with the Act and its purposes, not by its consistency with the FCC's or policy preferences.

Congress included yet another savings clause in § 261(c) of the statute. That provision provides that "[n]othing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part."[10]

Finally, in § 601(c)(1) of the Act, Congress provided courts with a special rule of construction in interpreting the Act so as to preserve state authority. Congress specified that the "Act shall not be construed to modify, impair, or supersede . . . State[] or local law unless expressly so provided."[11] Congress included this clause to "prevent[] affected parties from asserting that the [Act] impliedly pre-empts other laws."[12]

Verizon's preemption argument contradicts the very purpose of the 1996 Telecommunications Act, which is to promote competition. The Act does not preempt, but rather encourages, state laws that also promote competition. Therefore, the Commission should rely on state law, as well as federal law, to enforce Verizon's obligations under the ICA.

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[9] 47 U.S.C. § 251(d)(3)(B) & (C).

[10] *Id.* § 261(c).

[11] Act § 601(c)(1), 110 Stat. at 143 (uncodified note to 47 U.S.C. § 152).

[12] H.R. Conf. Rep. No. 104-458, at 201 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 215.

### C. Even if the Change-of-Law Provisions Applied, the ICA Prohibits Verizon From Unilaterally Terminating Provisions

Even if the *USTA II* decision announced a change of law, Verizon's obligations remain in effect until the agreement is formally amended. Any change of law that the *USTA II* decision announced must be resolved in accordance with the ICA change-of-law provisions. Verizon cites several change-of-law provisions in its ICAs, but fails to acknowledge that the provisions in the Verizon/AT&T ICA would require Verizon to enter into negotiations, followed by arbitration, *before* Verizon could terminate UNEs.

Verizon is wrong when it argues that its ICAs "expressly permit" it to terminate UNEs after a simple notice period. In fact, the agreement with AT&T expressly *prohibits* such an action. Section 3.3 of the AT&T/Verizon ICA lists the bases for Verizon's termination of UNEs. Under this section, Verizon would be able to discontinue UNEs "if *required* by a final order of the Court, the FCC or the Commission." (emphasis added). As noted above, neither this Commission, the FCC, nor the D.C. Circuit has made any determination that Verizon is *required* to discontinue any UNE or combination of UNEs. Verizon cannot rely on this language here.

Thus, even if Verizon is correct and the *USTA II* decision announced a change in the relevant law, this change would only "allow"—as opposed to "require"—Verizon to discontinue UNEs. The AT&T/Verizon ICA contemplates this precise situation, and the ICA directs the parties to negotiate and arbitrate these issues:

> In the event such a final order [of the Court] allows but does not require discontinuance, [Verizon] shall make a proposal for AT&T's approval, and if the Parties are unable to agree, either Party may submit the matter to the Dispute resolution procedures described in Attachment 1.[13]

[13] *AT&T/Verizon ICA*, Section 3.3.

Although the next sentence of the ICA states that Verizon "will not discontinue any Local Service or Combination of Local Services without providing 45 days advance written notice to AT&T," such notice and discontinuation would only follow the procedural mechanisms expressly provided for in the previous sentence. Nothing in the ICA suggests that Verizon could unilaterally discontinue UNEs following a judicial decision that "allows" but does not "require" Verizon to do so.

Similarly, the general change-of-law provision in the ICA requires the Parties to negotiate and submit any disputes to Alternative Dispute Resolution.[14] Under this provision, either Party may "require that such terms [affected by the change of law] be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required."[15] If these negotiations fail to achieve a settlement, "the Dispute shall be referred to the Alternative Dispute Resolution procedures set forth in [the ICA]."[16]

Thus, even if *USTA II* brought about a change of law, if Verizon reacts to this change of law by unilaterally terminating UNE provisions—which it has announced it *will* do—this would violate the plain language in the ICA.

### D. Verizon's Restriction or Re-Pricing of UNEs Will Adversely Affect Competition in South Carolina

Verizon's repudiation of its obligations under its agreement with AT&T, as well as its other ICAs in South Carolina, will have a broad-ranging negative impact on the market. Verizon has announced its plans to restrict and burden access to the physical network components that CLECs cannot readily replicate and, to the extent Verizon will allow CLECs to use such

[14] *See AT&T/Verizon ICA*, Section 9.3.

[15] *Id.*

[16] *Id.*

components, the rates will be increased. Reduced access to UNEs, higher rates, and greater transaction costs in accessing UNEs will diminish the economic incentive for CLECs to remain in the market. Inevitably, CLECs will reduce or cease their participation in the South Carolina market.

Any negotiations between Verizon and one of the CLECs under these circumstances would hardly be a bargaining of equals. Verizon maintains that CLECs have the option of negotiating alternative terms for services now provided as UNEs. At the same time, Verizon asserts that in the absence of binding FCC rules, there is no restraint on its ability to withhold the services that CLECs must have to sustain competition. Thus, Verizon holds all the cards. In such a scenario there would be no genuinely bi-lateral agreements because Verizon could essentially dictate the terms of the agreements.

The results would be devastating to competition if CLECs are unable to obtain the necessary UNEs to serve its enterprise customers. In addition to the higher costs and resulting higher prices to customers that would most likely render CLECs less competitive in the market, the unavailability of these UNEs will subject even more of CLECs's business to the price squeeze effects of ILEC special access pricing. Not only would this put pressure on the viability in this market, but also it would make it more difficult economically for CLECs to aggregate customer demand to the level necessary to support the deployment of CLECs's own high capacity loop and transport facilities.

Under such circumstances, CLECs would consider raising their retail rates for local service, but there is no assurance that the market would bear the increase. Given the availability of Verizon's own retail service as a ready alternative, any increase in a CLEC's rate will result in a loss of market share. This prospect would have to be weighed against keeping retail rates

unchanged and suffering loss of margin. Obviously, each CLEC will act on the basis of its own business case calculations. But many CLECs will likely withdraw from the retail market altogether, or reduce the choice of products they offer, or limit the territories in which they operate. Accordingly, while the impacts of changes in UNE availability and/or UNE prices cannot be readily quantified, one result is certain: there will be fewer options for South Carolina customers, and inevitably less pressure on Verizon to invest or innovate in serving the South Carolina local market.

## III. CONCLUSION

For the foregoing reasons, the Commission should issue a declaratory ruling that Verizon's obligations under the Verizon/AT&T ICA filed with the Commission remain in effect unless and until the ICA is amended.

Respectfully submitted this 2nd day of July, 2004.

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**BEFORE**
**THE PUBLIC SERVICE COMMISSION OF**
**SOUTH CAROLINA**
**DOCKET NOS. 2003-326-C AND 2003-327-C**

**CERTIFICATE OF SERVICE**

This is to certify that I have caused to be served this day, one (1) copy of **AT&T's Response to Verizon's Opposition to Emergency Petition, and Petition for Declaratory Order** via electronic mail service and first-class mail service as follows:

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